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## Abortion: 2. Fetal status and legal representation

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It has long been accepted that, legally, "personhood" begins with live birth and that a fetus therefore has no legal status. Section 206 of the Criminal Code<sup>1</sup> embodies historic understanding in providing that "a child becomes a human being . . . when it has completely proceeded, in a living state, from the body of its mother whether or not (a) it has breathed, (b) it has an independent circulation, or (c) the navel string is severed."

Before complete birth the fetus is human of course, but is not a "being". As such, it is protected by the Criminal Code's prohibition of child destruction during birth (section 221) and by the abortion provision before labour starts. However, recent Canadian litigation and proposed litigation designed to prevent abortion have challenged this view, although with uncertain effect.

Generally, the rights of the fetus are not recognized, even though the property interests of an unborn child may appear to be protected. A guardian may be legally appointed to hold property bequeathed to an unborn child and to transfer it to the child's estate upon live birth. This gives effect to the intention of the person making the will (the testator) that the unborn child should inherit upon birth. However, if the child is not born alive the property is disposed of as part of the testator's estate. It never becomes part of the estate of the unborn child. This legal procedure simply postpones the distribution of property until the gestation period is over.

Similarly, if a fetus is injured in utero and is subsequently found, when born alive, to be affected by the injury, legal action can be taken. However, this is the right of a human being, not of a fetus. For instance, in Illinois in 1976 a child was awarded damages for injury resulting from negligent transfusion of mismatched blood into her mother more than 7 years before the child was conceived.<sup>2</sup>

On the other hand, if a child is unborn or its life ends in utero, no legal action can be taken on its behalf. In the case of *Dehler v. Ottawa Civic Hos-*

*pital*,<sup>3</sup> Dehler claimed to act as the legal representative of "unborn persons" to prevent the performance of abortions at Ottawa Civic and Riverside hospitals. Surprisingly, the action proceeded through the preliminary stages. However, the proceedings were terminated with the ruling that "since the law does not regard an unborn child as an independent legal entity prior to birth, it is not recognized as having the rights the plaintiff asserts on its behalf or the status to maintain an action."

This ruling reflected a 1933 decision by the Supreme Court of Canada on an appeal from Quebec: the court recognized the right of a child only "if born alive and viable".<sup>4</sup> Later cases have not, however, emphasized this criterion (the ability to remain alive).

There was some confusion in 1979 when a man took legal action in the Supreme Court of Nova Scotia to prevent his estranged wife from having an abortion. He sought an injunction to prevent Victoria General Hospital in Halifax from performing the procedure, which had been approved by its therapeutic abortion committee.\*

The hospital yielded to the pressure: the abortion was not performed and the husband's litigation was not pursued. However, while the action was pending, a member of the local antiabortion group made a unilateral (nonadversarial) application to a family court judge to appear as guardian *ad litem* for the unborn child in the Supreme Court proceedings.<sup>7</sup> While the family court's jurisdiction to grant such an application remains questionable (Professor Arthur Foote, Dalhousie University law school: unpublished observations, 1979), the judge gave permission, thereby leaving it to the Supreme Court to reverse his decision if it was incorrect.

Since the husband's litigation was not pursued, the guardianship *ad litem* never took effect. When the wife

\*Such action would have appeared unlawful in Quebec, where the Health Services and Social Services Act provides that "the consent of the consort shall not be required for the furnishing of [health] services in an establishment".<sup>5</sup> Similarly, in Ontario the Family Law Reform Act provides that "a married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person".<sup>6</sup>

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later acted to quash the family court's permission for guardianship, the Supreme Court declined to hear a matter no longer of consequence. Unfortunately, the status of the guardianship therefore remained undetermined.

The press reported the appointment as being that of a general guardian of the unborn child. This raised speculation about the guardian's control of the mother and her lifestyle, and about the responsibility to the child, should it be born alive, for an injury the guardian failed to prevent. However, the guardianship *ad litem* was created only to defend the legal interests of a person at legal disability. The *Dehler* decision, of higher status than that of a family court, indicated that an unborn child is not considered a person.

It was suggested in a case in British Columbia in 1979 that, during labour, an unborn child may be considered a "person" for certain purposes.<sup>8</sup> Section 203 of the Criminal Code states that "every one who by criminal negligence causes death to another person is guilty of an indictable offence". Under section 206 an unborn child is not a human being and is therefore not amenable to legal homicide. The fetus is protected by the child destruction provision of section 221, but only if death is caused "in the act of birth . . . in such a manner that, if the child were a human being, [the offender] would be guilty of murder." Murder involves the deliberate risking of death, while causing death by criminal negligence is, at most, manslaughter. Thus, if section 203 is not applicable, negligent killing during labour may be unpunishable.

The British Columbia case concerned an unqualified midwife's conduct during a home birth; the child did not survive a breech delivery. At the trial negligence was not found and the midwife was acquitted. The legal ruling is of interest, since, if it is correct, it provides the only means under the Criminal Code by which negligence causing death of a fetus during labour can be punished. (A civil duty of care is owed to a pregnant woman, of course, which may support her claim for damages.) It does not affect the deliberate ending of unborn life, however, either during labour, to save the mother's life (section 221[2]), or by lawful abortion (section 251[4][c]).

It seems that Canadian society must rely on such judicial decisions to develop the law on fetal status, protection and legal representation. Politicians and legislatures are wary of the abortion-related furore these topics trigger.

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